

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1478

77-1478

IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket Number 77-1478

UNITED STATES OF AMERICA,

vs.

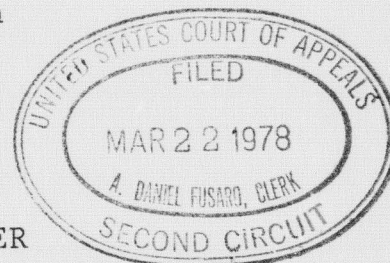
DANIEL LEE RUCKER,

Appellee,

Appellant.

Appeal from a Jury Verdict in the United
States District Court for the Western
District of New York.

BRIEF FOR APPELLANT DANIEL LEE RUCKER



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ISSUES PRESENTED *

In the opinion of Appellant Rucker the following issues are presented:

1. Whether the admission in the Government's direct case of appellant Rucker's prior conviction for bank robbery of the exact same bank as charged in the indictment was reversible error.
2. Whether, as to count one, the Government failed to prove that the bank was entered with the specific intent to commit bank robbery.
3. Whether the court's instructions were improper?
4. Whether appellant was deprived of his right to a speedy trial.
5. Whether the court committed error in admitting the hearsay testimony of Rene Rivera.

*That this case has not previously been before this Court.

UNITED STATES COURT OF APPEALS

for the Second Circuit

Docket No. 77-1478

UNITED STATES OF AMERICA, Appellee

vs.

DANIEL LEE RUCKER, Appellant

Appeal from the United States District Court
for the Western District of New York

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

On December 2, 1976 an indictment was filed against appellant, Daniel Lee Rucker, and a co-defendant, Eugene Smith¹, charging Rucker with two counts of entering a federally insured bank with intent to take by force and violence money belonging to the bank in violation of 18 U.S.C. § 2113 (a) and § 2, and with two counts of conspiracy to commit bank robbery in violation of 18 U.S.C § 371.

¹The co-defendant, Eugene Smith, appellant in this Court in Docket No. 77-1479 was charged with only one count of violating 18 U.S.C. § 2113 (a) and one count of violating 18 U.S.C. § 371.

Trial by jury commenced before the Honorable Thomas C. Platt² in the Western District of New York on October 24, 1977³ and the jury returned guilty verdicts on all counts as charged on October 27, 1977.

On November 21, 1977, appellant Rucker was sentenced on counts one and two, for violations of 18 U.S.C. §2113 (a), to a term of imprisonment of twelve years and on counts three and four, for violation 18 U.S.C. §371, to a term of imprisonment for five years, all sentences to run concurrently.

This appeal followed.

THE GOVERNMENT'S CASE

The government charged that on May 14, 1976 appellant Rucker entered the Marine Midland Bank, Hudson Avenue, Rochester, New York with intent to commit robbery and that from May 8, 1976 to the filing of the indictment, appellant Rucker entered into a conspiracy with one Roberto Louis Rivera to rob the bank.

Additionally, the government charged that on September 29, 1976, appellant Rucker, together with co-defendant Eugene Smith, entered the First National Bank, Georgetown Plaza Branch, Rochester New York, with intent to commit robbery and from the day of the

²Judge Platt, United States District Judge of the Eastern District of New York, was sitting by designation.

³The jury was selected on October 17, 1977 but not sworn until one week later on October 24, 1977.

robbery until the filing of the indictment, appellant and Eugene Smith together with one Edward Lee Brown entered into a conspiracy to rob the bank.

Employees of both the Marine Midland Bank and the First National Bank testified about a robbery and two attempted robberies at their respective banks. Ruby Levy testified that she was a teller at the Marine Midland Bank, 1500 Hudson Avenue, Rochester, New York on May 12, 1976 when a white man entered the bank and handed her a note demanding money. (Tr. 198-199)⁴ When Mrs. Levy called another teller over to see the note, the man abruptly took the note and left the bank without any further conversation and without any of the money. (Tr. 199-200).

Mrs. Levy further testified that two days later, on May 14, 1977 the date charged in the indictment, a man she believed to be the man who had originally handed her the note two days earlier returned to the bank. (Tr. 200-201) Mrs. Levy stated that the man, who appeared to be ill, had entered the bank and gone to a counter where deposit slips are made out when she noticed him and called out "isn't that him" to another teller. (Tr. 201) At that point, the man fled the bank.

There was no further testimony from any bank employee about this man's activities inside the Marine Midland Bank on May 14, 1976.

⁴"Tr." signifies the trial transcript. "Tr.S" signifies the transcript of the sentencing proceedings on November 21, 1977.

John Bartolotta, manager of the Marine Midland Bank, testified that on May 14, 1976 he heard Mrs. Levy call out something and he proceeded to chase a man out of the bank into a public housing project where the man escaped (Tr. 202-203). During that chase, the man turned and pointed what looked like a revolver at Bartolotta before effecting his escape (Tr. 203-204).

Neither of the bank witnesses made any in-court identification of the man who allegedly entered the bank on May 12 or May 14, 1976 and neither of them made any identification whatsoever of appellants Rucker and Smith.

There was also testimony introduced from bank employees of the First National Bank, Georgetown Branch, Rochester, New York, concerning a bank robbery which occurred there on September 29, 1976.

Cynthia Miller testified that she was a teller at the First National Bank on September 29, 1976 when a large, heavy, black man who was sweating profusely handed her a note demanding money. (Tr. 352-353, 363) Mrs. Miller handed the note to another teller who dutifully handed the man "Canadian bills" and "mutilated" or damaged bills (Tr. 354-355).

Mrs. Miller recalled that the robber told her he needed a "fix" right away and he wanted all large bills (Tr. 362-363).

Virginia Allen, Branch Manager at the First National Bank, testified that an audit showed that \$1,063.00 was taken in the robbery (Tr. 370).

A young, 14 year old boy, Brian Raskind, testified that he was in the First National Bank on September 29, 1976 and saw a heavy "sweaty" man hand the teller a note, take some money and leave the bank (Tr. 373-374). Raskind testified that after the man left the bank he got on a women's green, 10-speed bicycle and pedaled off in the direction of the Gold Circle Department Store a few blocks away. (Tr. 374-378)

Mrs. Miller, the teller, testified that she was taken by the police from the bank to the Gold Circle store where she saw the same heavy black man in police custody, about twenty minutes after the bank robbery started (Tr. 364-365).

Patti Ann VanHove testified that on the day of the robbery she was sitting in front of the Gold Circle Department Store when she saw a "colored kid" ride a green 10-speed bicycle up to the store, leave it, and enter the store (Tr. 379-381). Miss Van Hove further testified that within three to five minutes of the man's entering the store, many police arrived and were circling the building (Tr. 383-385). She was apparently taken inside the store by the police and was present when they apprehended the man (Tr. 389-390).

Neither the bank employees of the First National Bank nor Mr. Raskind nor Miss VanHove made any in-court identification of the man who allegedly robbed the bank on September 29, 1976. In addition, none of those witnesses made any identification whatsoever of appellants Rucker and Smith.

Several police officers testified concerning the robbery at the First National Bank on September 29, 1976, but none of them gave any evidence directly relating to appellant's activities on that day.

Officer David M. Grassi, Irondequoit Police Department, testified that he removed \$365.00 from an Edward Lee Brown at the Gold Circle Department Store at 1:55 P.M. on the day of the First National Bank robbery.

Officer Gerald Bates, Irondequoit Police Department, testified that he recovered a green, 10-speed bicycle at the Gold Circle Department Store on the day of the First National Bank robbery as well as a green army jacket, hat, cutter, and sun glasses from a shopping cart inside the store (Tr. 478, 481-482).

The note handed to Cynthia Miller demanding money (Tr. 352-353) was tested for fingerprints by Officer Bates but no identifiable prints were found (Tr. 480, 498-499). Apparently, no prints were taken of the green bicycle.

Officer Thomas Gervasi, Irondequoit Police Department, testified that six days after the First National Bank robbery he turned over the green 10-speed bicycle to a Sally Rucker (Tr. 513-514).

The only direct evidence linking appellant Rucker to the bank robbery on September 29, 1976 and the entry into the bank on May 14, 1976 was the testimony of two admitted accomplices Roberto Louis Rivera and Edward Lee Brown.

Roberto Rivera testified that on May 14, 1976 Rucker talked to him about "a big job" at the Marine Midland Bank, Hudson Avenue, Rochester, New York (Tr. 69-70). Rivera testified that he, Rucker and Edward Lee Brown drove to the bank and he and Brown went to the front of the bank. Rivera entered the bank, handed a note to the teller and then fled, without any money, when the teller got nervous (Tr. 72).

Two days later on May 14, 1976, the date charged in the indictment, Rucker allegedly talked to Rivera again about robbing the bank. According to Rivera, Rucker gave Rivera a note, jacket, hat, sun glasses and a cap gun (Tr. 73-74). Rivera then went up to the bank alone, but "there was alot of people there", and so Rivera left the bank almost immediately without doing anything inside the bank (Tr. 75, 139-140). Rivera recalled that someone from the bank chased him as he fled the bank.

On cross-examination, Rivera stated that on May 14, 1976 he had no intention as he approached the bank and as he entered it, of taking any money from the bank (Tr. 139-140). The only reason he even went to the bank was out of fear of Rucker (Tr. 139). Rivera testified as follows:

QUESTION (By attorney Larimer): Well, on May the 14th, this is the second day then, was it your intention to go in and remove money from the bank in question.

ANSWER (By Roberto Rivera): No

QUESTION: When you left Mr. Rucker and you were walking toward the bank, was it your intention at that time to remove anything from the bank in question.

ANSWER: No

QUESTION: When you got inside the bank was it your intention at that time to remove anything from the bank.

ANSWER: No

QUESTION: How long had you actually been in the bank on the second time, May the 14th, when you noticed that people seemed to recognize you.

ANSWER: About 20 seconds. (Tr. 139-140)

Many things were developed through cross-examination which cast doubt on Rivera's testimony.

Rivera admitted that, although a friend of appellant Rucker, he was closer to the other accomplice who had testified, Edward Lee Brown (Tr. 90). Remarkably, the witness admitted that the first time he had ever admitted that Edward Lee Brown was a participant at the May 12, 1976 attempt was just prior to his testimony at trial in October, 1977 while he was being prepared for trial in the United States Attorneys Office (Tr. 142-143). He admitted that he had never mentioned Brown's involvement at either the Grand Jury or in any statement given to the F.B.I. (Tr. 91-95).

In fact, he admitted that when he first talked with the police about his involvement at the Marine Midland robbery attempt on May 14, 1976 he completely neglected to tell the police that he was also at the same bank on May 14, 1976, the date ultimately charged in the indictment (Tr. 132-133).

There were several other items which were mentioned for the first time at this trial. Rivera claimed that a man named "Pops" was also outside the bank on May 14, 1976 and had a conversation with appellant Rucker (Tr. 75-122).⁵ However, Rivera admitted that he neglected to tell either the F.B.I. or the federal Grand Jury this crucial fact (Tr. 125-126).

Rivera's alleged reason for performing all these tasks--fear of Rucker--was also never mentioned by Rivera in any of his prior statements to the F.B.I. or the Grand Jury (Tr. 123-124). Rivera's explanation for attempting to rob a bank on two occasions was incredible. He claimed he only went to Rucker's house to discuss the matter at all because of fear (Tr. 82). On another occasion he said he really didn't know why he did it, that he did not need the money (Tr. 86-87). For his efforts Rivera was apparently to receive none of the proceeds (Tr. 87, 103, 120).

Rivera admitted that he was not being prosecuted by the Government for his activities, although he had concern about possible state charges (Tr. 79-81). Rivera further admitted that when he was first arrested on the bank robbery charge he did not want to go to

⁵David L. Jackson testified that his nickname was "Pop" and that he had a conversation with appellant Rucker near the Marine Midland Bank on Hudson Avenue at which time Rucker allegedly told him that he had "psyched" Roberto Rivera to rob a bank (Tr. 169-171). This testimony was somewhat tarnished when Jackson admitted on cross-examination that he and Mr. Rucker were not on good terms, that Jackson had not told the police about this conversation until five months after the May occurrence and that when Jackson did tell the police about Rucker's alleged involvement it was on the same evening that Jackson was recuperating in the hospital after allegedly being assaulted and stabbed by Mr. Rucker (Tr. 185-188).

jail because he feared what might happen to him there (Tr. 96). He also recalled that when talking to the F.B.I. agents in jail, it was the agents who first mentioned Rucker's name and not Rivera (Tr. 95-96). Rivera admitted that when he was arrested, after he made his statements to the police about Rucker, he was only in jail a few hours and that the police talked to an Assistant District Attorney and a Judge and effected his release (Tr. 134).

Edward Lee Brown testified that although he actually entered the First National Bank on September 29, 1976, held up the teller and removed money, that it was all appellant Rucker's and Smith's idea (Tr. 211-212). Brown testified that after discussing the robbery plans with Rucker and Smith he went to the First National Bank, handed a note to the teller demanding money, and then fled the bank on a green bicycle allegedly provided by Rucker (Tr. 230-232). Brown said he left the bicycle at the Gold Circle Department Store where he was arrested (Tr. 232-234). Prior to his arrest in the store, he claimed to have had a conversation there with both appellants Rucker and Smith and passed some of the money to appellant Smith (Tr. 233). He was arrested after he had removed his coat and hat and was attempting to purchase some clothes in the store (Tr. 234).

Like Rivera, Brown belatedly recalled that he was also present on May 12, 1976 at the Marine Midland Bank when Rivera attempted to rob it (Tr. 260-263). The subject apparently just came up "by accident" when he was discussing his trial testimony

at the U.S. Attorneys Office prior to trial (Tr. 263, 299). Brown admitted that Rivera was also at the U.S. Attorneys Office on the day he suddenly remembered his May, 1976 involvement, although he denied Rivera prompted the sudden remembrance (Tr. 299-300).

Brown's testimony was seriously challenged in several respects on cross-examination.

Brown admitted giving a complete stenographic statement to the police when he was arrested in the Gold Circle Department store on September 29, 1976 (Tr. 242). Brown conceded that that stenographic statement consisting of approximately 15 pages (Defense Exhibit AA) was in most respects directly contrary to his trial testimony (Tr. 242, 323). For example, Brown originally told the police that he alone was involved (Tr. 244), that he prepared the written note (Tr. 243), that he was high on liquor, grass and pills prior to the robbery (Tr. 244), and that he was counting the money to give to his own brother (Tr. 245). Brown admitted that he only spent two months in jail on these charges and that the day after he testified before a federal Grand Jury implicating the appellants, he was allowed to plead guilty to a reduced state charge and was immediately released from custody (Tr. 249-251, 297). Thereafter, he was placed on probation.

Brown was promised prior to his Grand Jury testimony that in consideration for that testimony he would not be prosecuted by the Government for the September 29, 1976 bank robbery at the First National Bank (Tr. 253).

Brown admitted to a litany of other criminal ventures for which he was exonerated by virtue of his cooperation. He admitted an armed robbery of a pizzeria (Tr. 253), two robberies of a laundromat (Tr. 267), and a purse snatching. (Tr. 268). Although he denied involvement, Brown also admitted that when he pleaded guilty to a reduced charge on the First National Bank robbery, he had previously been indicted for a prior armed robbery at Red Wing Stadium in Rochester (Tr. 248-249).

In addition, Brown stated that while in jail for the bank robbery he learned from his family that they believed both Rucker and Smith had burglarized Brown's house. Remarkably, Brown admitted that he had told people that "he would get even" with Rucker and Smith for that alleged burglary (Tr. 295-296). It was shortly after that incident that Brown testified before the federal Grand Jury and implicated both appellants Rucker and Smith in Brown's bank robbery exploits on September 29, 1976 (Tr. 296).

As its final witness the Government called Nora Cameron a former teller at the Marine Midland Bank, 1500 Hudson Avenue. This was the same bank at which the May 14, 1976 robbery attempt occurred as charged in the instant indictment. Mrs. Cameron testified that on January 15, 1976 she was robbed by two black men at gun-point. She made no identification of appellant Rucker or of anyone else.

Over repeated objections (Tr. 37-47, 412-418, 522, 526), the court allowed the Government to introduce evidence of and to read to the jury a certified copy of appellant Rucker's prior conviction in Monroe County Court, Rochester, New York, of grand larceny, 3rd

degree on May 3, 1976 in connection with Rucker's alleged involvement in the January 15, 1976 bank robbery at the Marine Midland Bank, 1500 Hudson Avenue (Tr. 527-529).

The court allowed the prosecutor to read parts of the indictment concerning the January 15, 1976 robbery (Tr. 530) as well as the record of Rucker's sentence for that robbery (Tr. 528-529).

In addition, the court allowed the prosecutor to read, in its entirety a statement allegedly made by Rucker to the police on the day of his arrest for the January 15, 1976 robbery (Tr. 530-533).

Prior to the prosecutor's reading of the evidence, the court gave a cautionary instruction to the jury (Tr. 522-525).

THE DEFENSE CASE

Appellant Rucker testified and presented two other witnesses to support his claim that he did not participate in any of the criminal activities attributed to him by the Government witnesses.

Rucker testified that he was twenty years old, lived with his mother and has passed the eleventh grade in school (Tr. 565). He was presently unemployed but worked with the CETA program during the summer and also was employed through the Monroe County Probation Department (Tr. 565).

Rucker denied meeting with Roberto Rivera and Edward Lee Brown to discuss plans to rob the Marine Midland Bank on May 12 and May 14, 1976 (Tr. 567). He also denied seeing Edward Lee Brown on September 29, 1976

and discussing with him Brown's robbery of the First National Bank (Tr. 568).

Although Rucker did not specifically recall what he was doing on May 12 and May 14, 1976, he did recall that on September 29, 1976 the day of the First National Bank robbery he spent the day fixing his car and installing new brake shoes (Tr. 569).

Rucker first learned on September 29, 1976 that Brown had robbed the First National Bank when a friend, Michael Smith, came out of Rucker's house and told him the news of Brown's bank robbery at the First National Bank was on television (Tr. 569).

Rucker stated that he knew Brown and had previously had arguments and disagreements with him (Tr. 570). He also testified that he had serious fights with two other Government witnesses, David Jackson and Leonard Hall. In the summer of 1976 he had a fight with David Jackson and that Jackson had threatened him after the fight (Tr. 570-573). He also had an argument with Hall which resulted in Hall's getting a .22 caliber rifle and threatening Rucker.

Both Michael Smith and Rucker's mother, Sally Rucker, testified and corroborated Rucker's testimony that on the day of the First National Bank robbery Rucker spent most of the day fixing his car in front of his residence at 241 Seneca Manor Drive (Tr. 548-550, 562).

Mrs. Rucker testified that she did not see Edward Lee Brown on the day of the robbery but learned on television that he had been involved (Tr. 547-548). She also testified that on the day of the robbery she noticed that her daughters bicycle was missing and when

she could not locate it the next day she filed a stolen bicycle report with the Rochester Police Department (Tr. 550-551). Mrs. Rucker identified this report (Defense Exhibit H) and testified that she showed it to the Irondequoit Police Department when she retrieved the bicycle from their custody (Tr. 551-553).

Michael Smith testified that he saw Rucker working on his car on September 29, 1976 at about 11:30 A.M. and that he was still working at about 5:30 P.M. (Tr. 562). Smith also testified that when he visited Brown in jail after the September 29, 1976 robbery at the First National Bank, Brown told him that he would "get even" with appellant Rucker and Smith for allegedly breaking into Brown's house (Tr. 563-564). Smith also recalled that on the day that Brown was arrested for the First National Bank robbery, he saw Brown's brother, David Brown, with a substantial amount of money (Tr. 564-565).

Eugene Smith also testified in his defense and said that on the day of the First National Bank robbery he saw Edward Lee Brown in the morning and together they smoked approximately seven marijuana cigarettes. Smith claimed they both were getting high (Tr. 580-583, 586).

Smith denied that there was any discussion about committing a bank robbery at the First National Bank (Tr. 583-585). He did recall that when Brown left Smith's residence, Brown said he needed money and was going to try and get some (Tr. 583).

As a rebuttal witness, the Government called Frederick Webb who claimed that on the day before, appellant Rucker had given him a subpoena to testify and allegedly asked him to testify that neither Rucker nor Smith had any connection with the September 29, 1976 robbery. Webb claimed he was offered \$400.00 by Rucker to so testify (Tr. 617-618). On cross-examination, it was established that Webb was a good friend of the Government's principal witness Edward Lee Brown and was currently living with him (Tr. 625-626). Webb also indicated that after he received the subpoena he left work and that he was concerned about not complying with the subpoena (Tr. 622-624). When the F.B.I. came to his house on the evening he received it, he thought he was in trouble for not complying with the subpoena (Tr. 622).

To rebut that testimony, Rucker again took the stand and testified that when he gave the subpoena to Mr. Webb, Webb complained that he was going to lose money for coming to court (Tr. 653). Rucker also testified that when he discussed coming to court with Webb, Webb said that he was living with Brown and he did not want any trouble with him because of his testimony (Tr. 654). Rucker denied offering to pay Webb \$400.00 to testify and stated that the only discussion concerning money was that Webb would be entitled to a witness fee for testifying pursuant to the subpoena (Tr. 653-654).

ARGUMENT

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO ADMIT EVIDENCE OF APPELLANT RUCKER'S PRIOR CONVICTION FOR BANK ROBBERY OF THE SAME BANK FOR WHICH HE WAS ON TRIAL

In appellant's view, the admission in the Government's case-in-chief of evidence of appellant Rucker's prior conviction for a bank robbery at the exact same bank for which he was being tried in this case was so prejudicial as to require reversal.

When considering the facts before the jury when this evidence was introduced, it is hard to imagine a more prejudicial piece of evidence which must have seriously infected the jury.

Appellant submits that under the Federal Rules of Evidence, Rules 403 and 404 (b), and the case law on point, the probative value of this proffered evidence was minimal in light of its highly prejudicial character.

In appellant's view, the trial court clearly abused its discretion in this matter and this court should reverse.

It is, of course, clear that evidence of crimes not charged in the indictment is not admissible for the purpose of showing that the defendant had such a criminal disposition that he must have committed the crime for which he is charged.⁶

⁶Fed. R. Evid. 404 (b); Michelson vs. United States, 335 U.S. 469, 475-476 (1958).

For evidence of another crime to be admissible it must first meet the requirements of Section 404 (b). We do not believe that this evidence satisfies any of the exceptions allowing the admission of other crimes as defined in Section 404 (b). In our view, the Government cannot demonstrate that evidence of appellant Rucker's prior conviction demonstrated anything other than that Rucker was guilty of robbing the same bank once previously and therefore, in the minds of the jurors, he probably did it again.

Even if the evidence is arguably relevant under Section 404 (b), we think that the court abused its discretion in not excluding it under the principles of Rule 403.

It has been well recognized that proof of another crime is always damaging to a defendant on trial.

As the court said in United States vs. James⁷ quoting from United States vs. Phillips⁸:

"Evidence of a prior crime is always . . . prejudicial to a defendant. It diverts the attention of the jury from the questions of the defendants responsibility for the crime charged to the improper issue of his bad character."

Furthermore, it seems clear that even where the evidence offered is arguably within one of the so-called exceptions traditionally recognized and now codified at 404 (b), Fed. R. Evid., if its probative

⁷555 F. 2d 992, 1000(D.C. Cir., 1977).

⁸401 F. 2d 301, 305 (7th Cir., 1968).

value is "slight" and its prejudicial character "strong" then the trial court has a "duty" to exclude it.⁹ This duty springs from the obvious danger that a defendant will be convicted not for what he did but for what he was.¹⁰ Once the evidence of a previous prior criminal act has been introduced, it is extremely difficult to keep the jury's attention properly focused.

This court has noted that:

"It is generally recognized that there can be no complete assurance that the jury even under the best of instructions will strictly confine the use of this kind of evidence to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed a prior similar criminal act, probably committed the one with which he is actually charged."¹¹

This danger of prejudice is especially great when the prior crime is the same as the one for which the defendant is on trial. This court has noted in a not dissimilar context, when discussing the use of similar crimes for impeachment purposes, that "the potential for prejudice, moreover, is greatly enhanced where, as here, the prior offense is similar to the one for which the defendant is on trial."¹²

⁹See United States vs. Knohl, 379 F. 2d 427, 438-439 (2d Cir., 1967).

¹⁰See Palumbo vs. United States, 401 F. 2d 270 (2d Cir., 1968), cert. denied, 394 U.S. 947 (1969); Luck vs. United States, 348 F. 2d 763 (D.C. Cir., 1965).

¹¹United States vs. Byrd, 352 F. 2d 570, 574 (2d Cir., 1965).

¹²United vs. Puco, 453 F. 2d 539, 542 (2d Cir. 1971).

The oft-quoted phrase of Judge, now Chief Justice Burger, in Gordon vs. United States¹³ is germane here:

"Strong reasons arise for excluding those (convictions) which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time'. As a general guide, those convictions . . . should be admitted sparingly."

In appellant Rucker's view, the evidence of his prior bank robbery conviction was not sufficiently probative under any exception listed in Section 404 (b) to warrant its admission. And, even if arguably admissible, its prejudicial effect was so great that the trial court abused its discretion in failing to exclude it.

First of all, the proffered evidence of appellant's record of conviction for the January, 1976 robbery together with the defendants statement concerning the offense which was also read to the jury were not sufficiently similar to the crime charged in the indictment to justify its admission. The evidence upon which the Government relied concerning the instant indictment was that Rucker somehow "psyched" or convinced both Roberto Rivera and Edward Lee Brown to rob a bank. There was testimony by these two accomplices that Rucker discussed the plan with them at several times prior to their separate bank robbery attempts. Although Rucker was allegedly in the vicinity of the two target banks, he had no role in the actual robberies themselves.

¹³Gordon vs. United States, 383 F. 2d 936, 940 (D.C. Cir., 1967), cert. denied, 390 U.S. 1029 (1968).

There is no similarity whatsoever, either in the planning or the execution, between the crimes charged in the indictment and Rucker's previous conviction for bank robbery in January of 1976 of the same Marine Midland Bank. The fact that the same bank was the target bank in count one of this indictment and in the crime for which Rucker was previously convicted is not the type of "similarity" which justifies the admission of Rucker's prior conviction.

As this court has noted, the scope of the trial courts discretion to admit evidence of prior similar acts "does not permit introduction of every prior similar act which may contribute in some manner to a showing of intent . . . Probative value is dependent on the existence of a 'close parallel' between the crime charged and the acts shown".¹⁴

There is simply no close parallel in this case. Common scheme or plan is impossible to demonstrate here. There is no evidence introduced concerning Rucker's prior conviction that he participated in the planning of that crime at all. In fact, the statement offered as Rucker's is exculpatory for the most part. When he went to the bank with his brothers, he did not know the bank was to be robbed.

Neither motive nor intent for the robberies charged are established by evidence concerning the January 15, 1976 bank robbery unless the Government is allowed to suggest to the jury that one who has robbed before probably has the intent and motive to do it again.

¹⁴United States vs. Corey, 566 F. 2d 429, 431 (2d Cir. 1977).

As to identity, the evidence does not establish such a consistent pattern of conduct as to suggest that these robberies were all the "handiwork" of one man.¹⁵ In United States vs. Myers¹⁶ the Fifth Circuit held that evidence of a prior bank robbery should not have been admitted in the defendants trial for bank robbery. In reversing the conviction, the court there noted that "we have consistently held that for evidence of other crimes to be admissible the inference of identity flowing from it must be extremely strong."

The court reversed the bank robbery conviction finding that the evidence of the prior crime was inadmissible to prove identity because the two crimes did not bear such peculiar, unique or bizarre similarities as to make them the handiwork of the same individual.¹⁷

Under the Government's logic here, if this evidence is relevant and admissible it would seem that virtually any evidence of a prior bank robbery involving the same defendant would be admissible.

In short, "the Government introduced slightly similar conduct of highly questionable probative value."¹⁸ For that fact alone, the trial court should have excluded the evidence.

¹⁵See United States vs. Bussey, 432 F. 2d 1330, 1333, (D.C. Cir. 1970).

¹⁶550 F. 2d 1036, 1045 (5th Cir. 1977).

¹⁷Id. at 1045-1046.

¹⁸United States vs. Greenfield, 554 F. 2d 179, 186 (5th Cir. 1977) (Emphasis in original)

An equally compelling reason for excluding the evidence is that the prejudicial effect of its admission far outweighs any conceivable probative value. Even if the evidence of prior crimes is arguably admissible for some legitimate purpose, the trial court may exclude the evidence or prior misconduct "if its potential to foster unfair prejudice against the accused outweighs the probative value to be gained by its admission".¹⁹

It must be obvious that a conviction for robbing the exact bank for which the appellant was on trial was highly prejudicial and must have affected the jury's verdict. This is especially so in this case where the Government's case was hardly overwhelming and relied almost exclusively on the testimony of accomplices to establish appellant's participation.

In addition, the evidence concerning the prior conviction showed that not only appellant but two other members of his family were involved in robbing the same Marine Midland Bank for which appellant was on trial. The jury must have therefore focused on the bank robbery propinquities of the Rucker family rather than focusing on the real issues of the trial. This so infected the jury that no curative instruction was adequate to undo the harm and re-focus the jury's attention on the legitimate issues of the case. The introduction of this highly prejudicial evidence denied appellant a fair trial and therefore the conviction should be reversed.

¹⁹United States vs. Ring, 513 F. 2d 1001, 1005 (6th Cir. 1975); see also United States vs. McFadyen - Snyder, 552 F. 2d 1178, 1183-1184 (5th Cir. 1977).

Furthermore, the cautionary instruction given by the court just prior to the introduction of Rucker's prior conviction was ambiguous and emphasised, to Rucker's detriment, the courts view that the January 15, 1976 robbery was similar to the robberies charged in the indictment (Tr. 522-525). Several times, the court referred to the fact that both offenses, i.e., the prior bank robbery and the indicted offenses, were "very like in nature" (Tr. 523-525).

This statement by the court invaded the jury's province because the court, by the language used, implied to the jury that the crimes were similar. The charge was ambiguous for the following reason. On the one hand, the court told the jury that they must find "beyond a reasonable doubt" that Rucker did the acts charged in the indictment before they could consider evidence of the prior crime (Tr. 524). Then, the court told the jury that it could consider the prior crime in determining both 1) the existence of a plan or a scheme and 2) the identity of the perpetrators (Tr. 524). This phraseology was repeated in the main charge at the end of the case (Tr. 761-763).

Of course, the planning of the robbery and the aiding of the robber were the only theories upon which the Government based its case against Rucker. These facts are further grounds for reversal here. Although appellant Rucker contends that the introduction of this evidence was by self so prejudicial as to require reversal, the lack of a proper cautionary instruction further underscores the prejudicial affect on appellant Rucker's case.

ARGUMENT II

THERE WAS INSUFFICIENT EVIDENCE AS TO COUNT
ONE THAT THE MARINE MIDLAND BANK WAS ENTERED
ON MAY 14, 1976 WITH SPECIFIC INTENT TO
COMMIT A ROBBERY

In count one, the Government charged appellant Rucker with entering the Marine Midland Bank, 1500 Hudson Avenue, Rochester, New York on May 14, 1976 with intent to commit a felony, i.e., bank robbery, in violation of 18 U.S.C. Section 2113 (a) and Section 2.

It is clear that the Government must prove, beyond a reasonable doubt, that the bank was entered with the specific intent to commit a robbery therein.²⁰ "The gravamen of the offense is not in the act of entering, . . . rather the heart of the crime is the intent to steal".²¹

In appellant Rucker's view, there was insufficient evidence of the requisite specific intent to steal for the case to have been submitted to the jury. At best, the evidence showed merely a conspiracy to commit bank robbery. Of course, the evidence is clear that no bank employee identified appellant Rucker at or near the bank on the day of the attempted robbery, May 14, 1976. The individual who entered the bank, Roberto Rivera, did testify that he had talked with appellant about the robbery and that Rucker was supposed to be outside the bank in the vicinity. However, even when viewed in the light most favorable to the Government, it seems clear that Rucker had no role at the bank itself. He did not enter the bank and was not a bank lookout.

²⁰ See Prince vs. United States, 352 U.S. 322, 328 (1957); United States vs. Scott, 529 F. 2d 338, 339 (D.C. Cir. 1975); United States vs. DeLeo, 422 F. 2d 487 (1st Cir. 1970); cert. denied 397 U.S. 1037 (1970)

²¹ Prince vs. United States, supra, 352 U.S. at 328.

In appellant's view, appellant could not be charged and convicted of aiding and abetting another in the commission of a crime when an essential element of the crime charged was absent, i.e., that the bank was entered with intent to commit a felony therein. The testimony of Roberto Rivera was quite clear that when he went up to the bank on May 14, 1977, he only went there to avoid trouble with appellant. He testified that he had no intention whatsoever of performing any felonious acts, bank robbery or otherwise, at the bank. (Tr. 139-140) Moreover, his actions support that testimony. Rivera was not disguised, he made no statements or threats in the bank, and was inside the bank for only a few seconds. Rivera's activities two days earlier on May 12, 1976 were more definitive in that he actually handed a note to the teller demanding money. Of course, that occurrence was not charged as an offense in the instant indictment.

In appellant Rucker's view, Rivera's actions, coupled with his admissions that he had no intent to rob the bank on May 14, 1976 demonstrate clearly that there was insufficient evidence to convict Rivera of entering the bank with the specific criminal intent and, a fortiori, insufficient evidence to convict Rucker. Rivera's actions of running from the bank on May 14, 1977 is evidence only that he feared recognition from his incident two days earlier. In fact, it was the testimony of the bank employees that Rivera had performed no anti-social act on May 14, 1977 but that he was recognized as the man who had attempted to rob the bank two days earlier. Such an act of flight certainly is ambiguous and no inference can be drawn from his flight that on May 14, 1976 he performed any act of bank robbery or

entry with intent to commit bank robbery. We certainly fail to see how Rucker could be convicted on this evidence of aiding and abetting in the commission of a crime when his role was so minimal and when the only evidence concerning the requisite intent was all negative and exculpatory, i.e., that the participant himself had no intent whatsoever to rob the bank. There must be the requisite criminal intent in the mind of one entering the bank - Rivera - for it to be possible for appellant Rucker to be convicted of aiding Rivera in the commission of that crime. This is especially true in the case of a violation of 18 U.S.C. Sec. 2113 because it is only the combination of both action and intent which constitutes a violation of Section 2113. There must not only be entry into the bank but also the requisite intent to do some felonious act inside to constitute a crime.

This Court has stated in discussing the culpability of principals and accessories that the criminal conduct "must exist in the minds of both the principal and aider or abetter".²² Similarly in United States vs. Jarboe,²³ the Court discussed the principles of aiding and abetting in a case where a bank robbery had been completed. The Court quoted Johnson vs. United States²⁴ which stated that:

²²United States vs. DeLaMotte, 434 F. 2d 289, 293 (2d Cir.), cert. denied 401 U.S. 921 (1971).

²³515 F. 2d 33, 36 (8th Cir. 1975), cert. denied 423 U.S. 849 (1975).

²⁴195 F. 2d 673, 675 (8th Cir. 1952)

"Generally speaking, to find one guilty as a principal on the ground that he was an aider and abetter, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed."

Using those general principles, it seems clear that there was no community of unlawful purpose at the time Roberto Rivera entered the bank in question. Likewise, it seems clear that since Roberto Rivera had no criminal intent it was impossible for appellant Rucker to share in it.

In Caton vs. United States²⁵, in discussing the sufficiency of evidence where the defendant had been charged with aiding and abetting a bank burglary, the Court noted that "it was not necessary for the Government to prove that both defendants entered the bank. It was sufficient to prove the one entered the bank with the requisite intent and the other aided and abetted the entry. In the instant case, it is of course precisely this essential element which was missing, namely, the element of intent. Roberto Rivera did not enter the bank "with the requisite intent" and therefore this entry was not "criminal" and appellant Rucker should not have been convicted for aiding that entry.

²⁵407 F. 2d 367, 371 (8th Cir. 1969), cert. denied, 395 U.S. 984 (1969).

ARGUMENT III

THE COURT'S INSTRUCTIONS WERE IMPROPER

- A. The Court's instruction concerning consciousness of guilt was erroneous.

In appellant Rucker's view, the court committed error in giving any instruction concerning consciousness of guilt of Rucker. This type of instruction was excepted to both before (Tr. 658-659) and after the courts charge (Tr. 788-789). This charge, based on the evidence before the jury, unduly prejudiced Rucker.

The court instructed the jury in part as follows:

When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence or this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. Ordinarily it's reasonable to infer that an innocent person does not find it necessary to invent or fabricate a statement in order to establish his innocence. (Tr. 781)

This suggested to the jury that there had been a false statement made by Rucker during his alibi testimony. Of course, there was no evidence introduced to rebut the factual alibi presented by Rucker.

This instruction could have been viewed by the jury as an opinion by the court and a suggestion to them that Rucker's

testimony should not be believed. This, of course, underscores our other concern with the instructions that the court unnecessarily singled out the defendant as having a motive to lie.

Even if the instruction on consciousness of guilt was proper, the court phrased the instruction in a manner which this court previously ruled requires reversal.

In United States vs. DiStefano,²⁶ this Court reversed a bank robbery conviction where the same District Court judge charged that the jury could consider false exculpatory statements made by the defendant there "as circumstantial evidence of defendants guilt".

The court held that, "false exculpatory statements are not admissible as evidence of guilt, but rather as evidence of consciousness of guilt".

In the instant case, the court charged the jury in language very similar to that ruled impermissible in DiStefano. The Court charged here:

"Conduct of a defendant, including statements knowingly made and acts knowingly done, upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the jury in the light of all other evidence in the case and in determining guilt or innocence, consciousness of guilt or of course in determining the innocence" (Tr. 781).

²⁶ 555 F. 2d 1094, 1104 (1977).

Although the Court earlier in the trial seemed to recognize the problem (Tr. 658)²⁷, the court erroneously charged the jury that conduct and statements of the defendant when confronted with a criminal charge may be considered "in determining guilt or innocence". (Tr. 781)

In DiStefano, there was no objection and yet the court reversed. Here there was objection in general to this charge and therefore this court should reverse.

B. The courts instruction concerning the defendants special interest was erroneous and denied the defendants a fair trial.

The court committed reversible error in its instruction to the jury on the special interest of the defendant in testifying.

The court instructed the jury as follows:

"The law permits a defendant, at his own request, to testify on his own behalf. The testimony of an individual defendant is before you. You must determine how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence which should be given to his testimony." (Tr. 780)

²⁷The court specifically referred to the DiStefano case (Tr. 658).

This charge, which was excepted to by defense counsel (Tr. 788), unduly singled out the defendant's special interest in very strong language. The court's language clearly signals the members of the jury that the defendant's testimony was highly skeptical.

This charge was not balanced as suggested in United States vs. Martin²⁸ where the trial court there explained that simply because the defendant had a vital interest did not mean he was not capable of telling the truth. This balancing statement did not appear in the court's instruction in the instant case. In light of the strong conflict between the Government witnesses, who for the most part were all accomplices, and the defendants, this instruction unnecessarily singled out the defendants as unworthy of belief simply because of their status. Both defendant Smith and Rucker had testified concerning alibis at the time of the September 29, 1976 robbery. The court failed to explicitly state, as was suggested also in United States vs. Floyd²⁹, that a defendant's vital interest in the outcome is not "inconsistent with the ability to render truthful testimony."

This erroneous instruction requires reversal here.

²⁸ 525 F. 2d 703 (2nd Cir. 1975), cert. denied, 423 U.S. 1035 (1975).

²⁹ 555 F. 2d 45, 47 n. 4 (2d Cir. 1977).

ARGUMENT IV

APPELLANT WAS DEPRIVED OF HIS RIGHT TO A
SPEEDY TRIAL

Appellant Rucker was denied his right to a speedy trial under 18 U.S.C. Section 3161, et seq., the Sixth Amendment, Fed. R. Crim. P. 48 (a), and the Western District's "Plan for Prompt Disposition of Criminal Cases."

The Speedy Trial Act, 18 U.S.C. Section 3161 (g) requires that appellant be tried no later than 180 days following arraignment subject to the exclusion of certain periods pursuant to 18 U.S.C. Section 3161 (h). This was not done.

An indictment was filed against appellant Rucker on December 2, 1976 and Rucker was arraigned on December 6, 1976. The jury was not picked in this case until October 17, 1977 and trial did not actually commence until a week later.

Appellant was not tried within the requisite 180 days from the filing of the indictment, including times properly excluded from that computation.

Although the Speedy Trial Act time limit sanctions are not yet applicable, the Western District "Plan for Prompt Disposition of Criminal Cases" does authorize the Court to dismiss an indictment for failure of the Government to be ready within 180 days. The trial court abused its discretion in not dismissing the^a instant indictment.

Although the Government, on several occasions, filed its routine Motion to Set Date for Trial, it is clear that the Government was not actually ready on those dates. The defendant's Notice of Motion for discovery and inspection and a Bill of Particulars, dated January 6, 1977, and returnable January 24, 1977 was not responded to by the Government until February 18, 1977, and it was not until June 23, 1977 that the Honorable Harold P. Burke granted Defendant's Motion for Discovery and Inspection in part and denied it in part. The Government was ordered by Judge Burke to turn over certain materials to the defendant on or before July 15, 1977.

Although the Government had not yet complied with that order, on or about June 28, 1977 the Government moved to set a date for trial which was returnable July 11, 1977.

Counsel for appellant Rucker appeared on that date and advised the court that he was ready for trial but that he had not received the discovery material which the Government had been ordered to produce.

Although the Government subsequently wrote defense counsel and allowed them to review "the complete F.B.I. investigative report" it later developed at trial that this file was not in fact complete.

After the jury had been picked on October 17, 1977, on October 21, two days before testimony was to begin, the Government belatedly advised defense counsel that it had just discovered a 16 page statement by the Government's principal witness, Edward Lee Brown, in the possession of the Irondequoit Police Department, which contained significant exculpatory material for both appellant Rucker and Smith.

This statement is Defense Exhibit AA.

Appellant recognizes that under the balancing test established in Barker vs. Wingo³⁰ his burden is not insubstantial. However, in appellant's view, the Speedy Trial Act now by statute supercedes the criteria established in the Barker vs. Wingo case. If the Speedy Trial Act is to have any effect whatsoever it must be rigorously enforced. The burden, of course, for seeing that the act is enforced rests ultimately with the Government.

So-called institutional delay does not exonerate the Government from pressing the court for a prompt trial. The Government cannot escape this duty by claiming that the delay is merely institutional.³¹

Although the length of the delay is not as great here as in other cases, as this court pointed out in United States vs. Roberts³²

A delay not patently unreasonable in length may nonetheless be intolerably long in light of the peculiar circumstances of the case. Barker vs. Wingo, 407 U.S. 512 (1972).

In our view, the circumstance of this case require dismissal. Both defendants offered alibi testimony concerning their whereabouts and activities on the date of the September 29, 1976 robbery. The time lapse

³⁰407 U.S. 514 (1971).

³¹United States vs. Vispi, 545 F. 2d 328, 334 (2d Cir. 1976); United States vs. Bowman, 493 F. 2d 594 (2d Cir. 1974); United States vs. Favolaro, 493 F. 2d 623 (2d Cir. 1974).

³²515 F. 2d 642, 646 (1975).

from occurrence to trial was sufficiently great to weaken the defendant's memory about those crucial facts.³³ What "tips the scales"³⁴ in appellants favor here is the violation of the time provisions of the Speedy Trial Act. Appellant was not tried within 180 days of the indictment, excluding the exempt periods provided for in 18 U.S.C. Section 3161 (h).

The Court in the Western District has been repeatedly chided by this Court concerning speedy trial violations,³⁵ and yet the requirements of the Speedy Trial Act continue to be ignored. If the Speedy Trial Act is to have any effect, then its provisions must be enforced.

The delay here was unnecessary and in excess of the 180 day period allowed and therefore the trial court abused its discretion in not dismissing the indictment.

³³ See Eg., United States vs. Carini, 562 F. 2d 144, 151 (2d Cir. 1977).

³⁴ Id.

³⁵ See Eg., United States vs. Vispi, Supra; United vs. Carini, Supra.

ARGUMENT V

THE COURT COMMITTED ERROR IN ADMITTING
THE HEARSAY TESTIMONY OF RENE RIVERA

The trial court also committed error which affected appellant Rucker's rights when it allowed Rene Rivera to testify about certain statements made to him by his brother, Roberto Rivera. Over objection (Tr. 146-147) the court allowed Rene Rivera to testify that Roberto Rivera told him that appellant Rucker had telephoned Roberto Rivera on May 14, 1976 and suggested he destroy the clothes worn by Rivera in the aborted bank robbery attempt (Tr. 145, 148). This testimony was inadmissible hearsay and was highly prejudicial to appellant Rucker.

Although the court originally sustained defense counsel's objection (Tr. 146), it reversed its ruling and allowed the testimony apparently in the belief that the alleged statement offered was made by a co-conspirator (Tr. 146-147).

However, it is clear from the testimony that whatever conspiracy existed previously, it had been terminated when Roberto Rivera's robbery attempt failed. Of course, Roberto Rivera himself testified that even prior to his entry into the bank, he had abandoned whatever plan had been previously concocted. He stated that before he had even entered the bank he had no intent to commit a robbery there (Tr. 139-140). Therefore, at least as of the time Roberto Rivera left the bank, the conspiracy had ended and Rivera had withdrawn from it.

In a case quite similar to the instant case, this court ruled that the introduction of such evidence was error.

In United States vs. Floyd,³⁶ a bank robbery prosecution, this court ruled that it was error to allow a witness to testify about the defendant's statements made to him the day after the robbery in connection with the burning and disposal of the get-away car. The court held that at the time of those statements, the conspiracy had ended and therefore statements of a co-conspirator would not be admissible but would be hearsay.³⁷

The court, citing Grunewald vs. United States,³⁸ held that the established rule is that once:

"The central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment."³⁹

Grunewald and Krulewitch vs. United States⁴⁰ established a "barrier at the end of a conspiracy"⁴¹ which limits the time within which hearsay declarations will bind co-conspirators.

³⁶555 F. 2d 45 (1977).

³⁷United States vs. Floyd, *supra*, 555 F. 2d at 48

³⁸353 U.S. 391, 401-402 (1957).

³⁹United States vs. Floyd, *supra*, 555 F. 2d at 48.

⁴⁰336 U.S. 440, 443 (1949).

⁴¹United States vs. Floyd, *supra*.

The Court in Floyd found that the conspiracy had ended and therefore statements of co-conspirators uttered after the conclusion of the conspiracy would not be admissible as an exception to the hearsay rule.

Here the disposal of Roberto Rivera's clothes was just as remote as the burning of the get-away car in Floyd. Both activities occurred after the conspiracy had ended. In the instant case this argument is even stronger since Rivera had admitted to withdrawing from the conspiracy much earlier when he testified that he had no intention of robbing the Marine Midland Bank (Tr. 139-140).

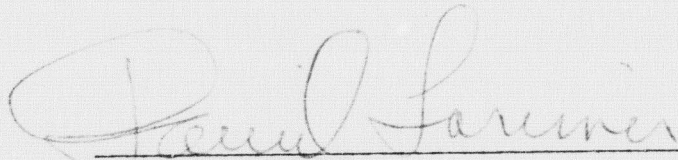
In light of the evidence against the defendants in this case - - based almost entirely on accomplice testimony - - this error cannot be considered harmless. The very basis for excluding hearsay testimony is its unreliability - - an unreliability greatly enhanced here in view of the nature of the case against the defendants. Taken in the totality of circumstances, this error together with the other alleged errors, requires reversal.

ARGUMENT VI

Appellant Rucker joins in the arguments of appellant Smith concerning the errors in the courts instructions.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be reversed and the District Court directed to dismiss the indictment or, in the alternative, the case should be remanded to the District Court for a new trial.

A handwritten signature in cursive script, appearing to read "David G. Larimer", is written over a horizontal line.

DAVID G. LARIMER

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UNITED STATES COURT OF APPEALS
STATE OF NEW YORK

UNITED STATES OF AMERICA,

Appellee,

vs.

AFFIDAVIT OF SERVICE

DANIEL LEE RUCKER,

Appellant.

STATE OF NEW YORK)
COUNTY OF MONROE) SS:

David G. Larimer, being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at Rochester, New York.

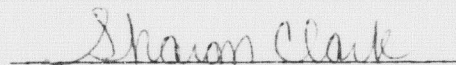
On. March 20, 1978 deponent served the within Brief upon Gene Welch at United States Attorneys Office, Rochester, New York for that purpose by delivering a true copy of said Brief upon Gene Welch personally.



DAVID G. LARIMER

Sworn to before me on

March 20, 1978.



SHARON CLARK
Notary Public, State of New York
Qualified in Monroe County
Term Expires March 30, 1979

